

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

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L.J. ZUCCA, INC.

Plaintiff,

v.

ALLEN BROS. WHOLESALE  
DISTRIBUTORS INC. *et al.*,

Defendants.

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C.A. No. 1:07-cv-2 (MPT)

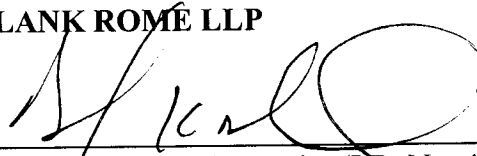
**DEFENDANT COOPER-BOOTH WHOLESALE COMPANY'S  
MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, Defendant Cooper-Booth Wholesale Company, by and through its undersigned counsel, hereby moves this Court for judgment on the pleadings dismissing Count I of Plaintiff L.J. Zucca, Inc.'s First Amended Verified Complaint. Count I of the First Amended Verified Complaint asserts claims for alleged violations of the Delaware Unfair Cigarette Sales Act, 6 *Del. C.* §§ 2601 – 2608. Defendant Cooper-Booth Wholesale Company seeks judgment on the ground that the Delaware Unfair Cigarette Sales Act is preempted by Section 1 of the Sherman Act, 15 U.S.C. § 1.

The factual and legal grounds for this Motion are set forth in Defendant Cooper-Booth Company's Brief in Support of Motion for Partial Judgment on the Pleadings, filed contemporaneously herewith. Oral argument is requested.

Respectfully submitted,

**BLANK ROME LLP**

A handwritten signature in black ink, appearing to read 'D. Sheppard', is written over a horizontal line.

Dated: January 23, 2007

David K. Sheppard, Esquire (I.D. No. 4149)  
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Attorneys for Defendant  
Cooper-Booth Wholesale Company

United States Constitution, the Delaware Unfair Cigarette Sales Act, 6 *Del. C.* §§ 2601 – 2608, is preempted by the Sherman Act, 15 U.S.C. § 1.

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J.

**CERTIFICATE OF SERVICE**

I, David K. Sheppard, certify that on January 23, 2007, I served a copy of **Defendant Cooper-Booth Company's Motion for Partial Judgment on the Pleadings** upon the following counsel in the manner indicated below:

**VIA ELECTRONIC SERVICE**

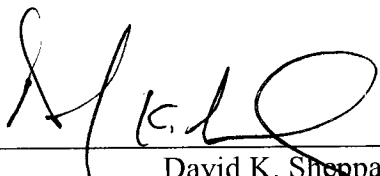
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\_\_\_\_\_  
David K. Sheppard  
I.D. No. 4149

IN THE UNITED STATES DISTRICT COURT  
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L.J. ZUCCA, INC.

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C.A. No. 1:07-cv-2 (MPT)

**ORDER**

THIS MATTER having come before the Court on Defendant Cooper-Booth Wholesale Company's Motion for Partial Judgment on the Pleadings for an Order under Rule 12(c) dismissing Count I of Plaintiff L.J. Zucca, Inc.'s First Amended Verified Complaint on the ground that, pursuant to Article VI, Paragraph 2 of the United States Constitution, the claims asserted under the Delaware Unfair Cigarette Sales Act, 6 *Del. C.* §§ 2601 – 2608, are preempted by the Sherman Act, 15 U.S.C. § 1; and the Court having considered the moving and opposing papers, argument of counsel, and having placed its findings of fact and conclusions of law on the record;

IT IS on this \_\_\_\_\_ day of \_\_\_\_\_, 2007, **ORDERED** that:

1. Defendant Cooper-Booth Wholesale Company's motion is **GRANTED**.
2. Count I of Plaintiff L.J. Zucca, Inc.'s First Amended Verified Complaint is

**DISMISSED** under Rule 12(c) on the ground that, pursuant to Article VI, Paragraph 2 of the

B L A N K



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January 23, 2007

**VIA HAND DELIVERY & ELECTRONIC FILING**

The Honorable Mary Pat Thyng  
United States District Court for the  
District of Delaware  
J. Caleb Boggs Federal Bldg.  
844 N. King St.  
Room 6100  
Lockbox 8  
Wilmington, DE 19801

**Re: L.J. Zucca, Inc. v. Allen Bros. Wholesale Distributors Inc., et al.**  
**Civil Action No. 07-CV-00002 (MPT)**

Dear Magistrate Judge Thyng:

We represent Defendant Cooper-Booth Wholesale Company ("Cooper-Booth") in the above-referenced matter. Today, Cooper-Booth filed a Motion for Partial Judgment on the Pleadings. A courtesy copy is enclosed. In our Motion, we contend that Plaintiff's claims under the Delaware Unfair Cigarette Sales Act, 6 *Del. C.* §§ 2601 – 2608, are preempted by Section 1 of the Sherman Act, 15 U.S.C. § 1.

We bring this fact to Your Honor's attention because, under 28 U.S.C. § 2403(b), the Court is required to notify the Delaware Attorney General of Cooper-Booth's constitutional challenge of the Delaware Unfair Cigarette Sales Act:

In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. . . .

28 U.S.C. § 2403(b).

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The Honorable Mary Pat Thyng  
January 23, 2007  
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We thank Your Honor for her time and consideration of this matter.

Respectfully,

David K. Sheppard  
I.D. 4149

DKS:ka/pfc  
Enclosure

cc: Stephen M. Orlofsky, Esquire (via inter-office mail)  
Kit Applegate, Esquire (via inter-office mail)  
(Co-Counsel for Defendant Cooper-Booth Wholesale Company)

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(Counsel for Plaintiff L.J. Zucca, Inc.)

Eric Rayz, Esquire (via First-Class Mail)  
(Counsel for Defendant Allen Bros. Wholesale Distributors Inc.)

Michael D. Fioretti, Esquire (via First-Class Mail)  
(Counsel for Defendant Eby-Brown Company LLC)

Brian C. Wille, Esquire (via First-Class Mail)  
(Counsel for Defendant Western Skier Ltd.)